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LINDA CATANO

V.

LABORATORY BILLING SOLUTIONS, INC.

ED(R) 0102-16; 16D-2016-000066

DECISION ON THE MERITS AFTER PUBLIC HEARING **ON MAY 19th AND 20th, 2021**

I. PROCEDURAL BACKGROUND

1. Linda Catano ("Ms. Catano") filed a Charge of Discrimination based on disability and retaliation in employment on March 28, 2016 against Laboratory Billing Solutions, Inc. ("LBS").
2. After the investigation by the Commission based on document production, interviews, and legal analysis concluded on November 12, 2020, the Investigating Commissioner found sufficient evidence had been produced to find probable cause that discrimination had occurred.
3. The Commission issued Orders of Notice on November 20, 2020, which notified the parties that the Investigating Commissioner found probable cause in this case and what the next steps in the process were.
4. On December 21, 2020, the Commission conducted a Prehearing Conference at which the parties agreed the issue presented for decision at the Public Hearing would be whether the Respondent failed to accommodate the Complainant and subsequently terminated her in retaliation for requesting a reasonable accommodation, in violation of NH RSA 354-A.

5. At the Prehearing Conference, the Public Hearing was scheduled for April 20, 2021. The parties also agreed to continue discussions towards a resolution, therefore the Commission scheduled a Final Pretrial Hearing for April 13, 2021.
6. At the Final Pretrial Hearing on April 13, 2021, counsel for the parties notified the Commission they were still attempting to depose a key witness. The Commission issued a subpoena for the witness to appear for her deposition and continued the Final Pretrial Hearing to April 20, 2021.
7. On April 13, 2021, Complainant withdrew the issue of failure to accommodate. The issue presented for the Public Hearing was then modified to whether the Respondent terminated the Complainant in retaliation for her disability and/or for requesting a reasonable accommodation in violation of NH RSA 354-A.
8. On April 20, 2021, counsel, the parties, and the Commission agreed the Public Hearing would be scheduled for a two-day Public Hearing on May 19th and 20th, 2021.
9. The Public Hearing was called to order on May 19, 2021. Commissioner Nancy LeRoy, Chair, Commissioner Basra Mohamed, and Commissioner Christian Kim were assigned to hear the case. Attorney Jon Meyer appeared on behalf of the Complainant, Linda Catano and Attorney Brad Lown appeared on behalf of the Respondent, Laboratory Billing Solutions, Inc.

II. AGREED UPON FACTS

10. Linda Catano was hired by LBS in 2010 as a Customer Service Representative working remotely from her home.
11. All of the LBS's Customer Service Representatives worked remotely from their homes.
12. In 2015, Ms. Catano developed a disability which substantially limited one or more of her major life activities, which required her to take Family Medical Leave Act (FMLA) time during June, July and September.

III. FINDINGS OF FACT BY COMMISSION PANEL

13. On November 7, 2012, Ms. Catano was issued a Correction Action Plan and placed on a 90 day probation period. The complaints consisted of allegations that Ms. Catano was rude, not professional, not meeting job requirements, and patients not being able to understand Ms. Catano.
14. On November 4, 2013, Ms. Catano was issued a second Corrective Action Plan and placed on a 1 year probation period. The complaints consisted of allegations that Ms. Catano was rude, dropped a call, and did not assist a doctor's office.

15. After Ms. Catano took FMLA leave during June and July for her disability, she provided LBS with a doctor's note dated July 13, 2015 that cleared her to return to work but with ergonomic recommendations for her work station.
16. On August 7, 2015, Complainant switched her hours with a co-worker without approval.
17. On September 9, 2015, LBS notified Ms. Catano that due to job performance issues she was required to attend in-person retraining in Portsmouth two days a week, on Mondays and Wednesdays, beginning September 14, 2015.
18. On September 11, 2015, Ms. Catano sent her supervisor, Maureen Holmes, and the Respondent's Director of Human Resources, Nancy Catalano, a note from her mechanic explaining that her car was inoperable. Ms. Catalano informed Ms. Catano she was still required to come to Portsmouth.
19. On September 14, 2015, Ms. Catano emailed Ms. Catalano stating that she had recently been out on FMLA for a shoulder and neck injury, the pain started to flare up again, and she requested the day off to attend a doctor's appointment. LBS allowed Ms. Catano to use sick time under FMLA.
20. On September 15, 2015, Ms. Catano submitted a doctor's note dated September 14, 2015 to LBS which stated that, "because of her cervical degenerative disc disease, Linda needs to minimize desk work/typing as well as driving until further notice (she is actively engaging in physical therapy)."
21. LBS informed Ms. Catano that the only work they had available was desk work/typing.
22. On September 16, 2015, the doctor's note was amended and indicated that Ms. Catano could work a reduced schedule of 6.5 hours a day and needed to rest every 30 minutes.
23. On September 21, 2025, LBS informed Ms. Catano that she would work the 1 – 8 PM shift on Tuesday, Thursday, and Fridays. On Mondays and Wednesdays, Ms. Catano would still be required to come to Portsmouth for 6.5 hours sometime between 9 AM and 5:30 PM. LBS also sought clarification of the length of rest time needed every 30 minutes.
24. Ms. Catano's doctor's note was amended for the second time on September 23, 2015, clarifying that Ms. Catano needed a 1-2 minutes rest every 30 minutes, that she could only work 6 hours a day, and that she could not drive more than 30 minutes. The note explicitly stated that Ms. Catano "cannot drive to Portsmouth".
25. On September 24, 2015, LBS notified Ms. Catano that since her work day was reduced to 6 hours that her lunch break was reduced to 30 minutes instead of 1 hour.

26. Maureen Holmes testified that Ms. Catano was upset about this change and stated in a phone call that she needed to use her 1 hour lunch break sometimes to pick up her granddaughter from school.
27. On the same day, September 24, 2015, Ms. Catano submitted a third amended doctor's note clarifying that she could work 6.5 hours a day.
28. On September 25, 2015, Ms. Catalano notified Ms. Catano by email, "[a]s a reply to your request for Accommodations, Maureen, you and I have discussed reducing your work schedule to 3 days per week (Tuesday / Thursday / Friday), 6.5 hours a day. This reduction [in] hours is due to the fact you are unable to drive to the Portsmouth office because of your FMLA medical issues."
29. The email further stated that Ms. Catano could continue to use paid or unpaid time off for FMLA leave on the Mondays and Wednesdays until October 9, 2015 since she could not attend retraining due to her medical issues.
30. On October 6, 2015, Ms. Catano was placed on a third Corrective Action Plan due to her making arbitrary changes to her own schedule without approval and several mistakes she made on customer calls. This action plan reiterated that Ms. Catano had to attend in-person retraining in Portsmouth 2 days a week to address these issues. The action plan also stated that if Ms. Catano did not follow the terms of this plan she would be subject to further disciplinary action up to and including termination.
31. On October 12, 2015, Ms. Catano submitted a doctor's note to LBS clearing her to work full-time, with 1-2 minutes breaks every 30 minutes, and no driving for more than 30 minutes.
32. According to testimony, Ms. Catano lived in Milford, NH at this time. Driving to Portsmouth would have taken her roughly 1.5 hours one-way, depending on traffic.
33. On this same day, LBS informed Ms. Catano that she can no longer use FMLA time to cover the days she was required to attend retraining in Portsmouth since she has had ongoing complaints and mistakes and is on a current Corrective Action Plan.
34. Ms. Catano was advised that she would be required to come into the Portsmouth Office on Mondays and Wednesdays, starting October 14, 2015.
35. On October 14, 2015, Ms. Catano did not show up for retraining. Ms. Catano testified that LBS knew she could not drive to Portsmouth on this day because of her doctor's note and lack of transportation.
36. On October 16, 2015, LBS notified Ms. Catano in an email from Nancy Catalano that because she did not notify anyone that she was not coming to Portsmouth on October 14, 2015, this was an "unexcused absence". LBS also notified Ms. Catano that if she

continued to not show up for retraining she would be placed on unpaid suspension until she began retraining.

37. On October 16, 2015, Ms. Catano emailed Ms. Catalano stating that she cannot drive to Portsmouth due to her doctor's restriction, and questioned why LBS has singled her out since no other Customer Service Representative has been asked to travel to Portsmouth for retraining.
38. Ms. Catano further stated in her email that she was willing to go against her doctor's orders, but that would cause her more pain which would result in the need for more physical therapy, and she cannot financially afford transportation to Portsmouth.
39. On October 19, 2015, the following Monday, Ms. Catano did not attend in-person retraining in Portsmouth, and was placed on unpaid suspension. According to testimony, Ms. Holmes and Nancy Catalano called Ms. Catano on her personal cell phone to go over mistakes she had made on recent patient calls and to inform her that if she did not appear for retraining on October 26, 2015 or thereafter she will be terminated.
40. According to testimony, Ms. Catano's son overheard the raised voices on the phone with his mother, he then interjected himself into the conversation because he was concerned for his mother's well-being.
41. On October 26, 28, and November 2, 2015, Ms. Catano attended in-person retraining. She used the assistance of her son and public transportation to travel to and from Portsmouth.
42. On November 3, 2015, according to testimony of Ms. Holmes, Ms. Catano was terminated by Ms. Catalano for breach of patient health information ("PHI"), because she allowed her son to overhear the phone conversation on October 19, 2015 in addition to Ms. Catano's poor work performance.
43. On the same day, Nancy Catalano emailed Thomas Hirsch (owner of LBS) to inform him that Ms. Catano was fired that morning for breaching the telecommuting policy regarding keeping her work area secure and confidential. This same email also assures that Ms. Catalano believes that no PHI was actually breached.

IV. DECISION ON THE MERITS

In order to receive a favorable decision, the Complainant shall have the burden of proving the case for the complaint by a preponderance of the evidence. NH Admin. R. PART Hum. 315.07.

A. LEGAL STANDARD

In order to establish a case of retaliation, the complainant must show:

- 1) That the complainant participated in a protected activity by either opposing a discriminatory practice or assisting someone else to do so;
- 2) That respondent was aware of his/her protected activities;
- 3) That respondent took adverse employment action or otherwise retaliated against, interfered with, or attempted to interfere with complainant; and
- 4) That respondent's adverse action followed complainant's protected activities within such period of time that retaliatory motivation can be inferred, or that other evidence exists which tends to show illegal motivation.

If complainant established the elements retaliation by a preponderance of the evidence, then respondent must articulate a legitimate non-discriminatory business reason for its actions. If respondent has done this, then the burden of production shifts back to complainant to show that respondent's explanation is a pretext for retaliation.

B. LEGAL ANALYSIS

44. Ms. Catano participated in a protected activity when she requested accommodations due to her disability.
45. Respondent was aware of Ms. Catano's protected activity.
46. Respondent took adverse employment actions against Ms. Catano when her employment was terminated.
47. The adverse action followed Ms. Catano's protected activity within such period of time that retaliatory motivation can be inferred. Specifically, Ms. Catano requested an accommodation to not be required to travel to Portsmouth for retraining in mid-September of 2015, Ms. Catano submitted revised doctor's notes regarding her condition, her work days were reduced on September 25, 2015, and then she was placed on unpaid leave on October 19, 2015. After Ms. Catano attended 3 retraining days in Portsmouth on October 26, 28, and November 2, 2015, LBS fired her on November 3, 2015.
48. Respondent produced an articulated legitimate non-discriminatory business reason for requiring Ms. Catano to attend retraining to correct her job performance deficiencies.
49. Respondent produced an articulated legitimate non-discriminatory business reason for terminating Ms. Catano, which was that Ms. Catano had breached confidentiality rules when she had a conversation about patient health information ("PHI") in the presence of her son.
50. Additionally, the Respondent produced sufficient evidence in the record of the legitimate non-discriminatory business reason for terminating Ms. Catano for her poor work performance.

C. CONCLUSION

51. The Commission Panel found that Respondent's articulated legitimate non-discriminatory business reason of breaching PHI for terminating Ms. Catano was a sham. First, October 19, 2015 was a Monday, which meant Ms. Catano was not authorized to work from home at that time, since she was required to attend retraining in Portsmouth that day. Second, Ms. Catano and her son testified that Ms. Catano's office door was shut, and that her son only interjected because he heard shouting and wanted to make sure his mother was alright. This is consistent with all other evidence on the record. Third, the call was made to Ms. Catano's personal cell phone. Respondent offered no reliable evidence to demonstrate that the conversation specifically addressed confidential patient information or that any PHI was breached. Furthermore, the Respondent offered evidence showing LBS admitted that no PHI was breached.
52. However, the Commission Panel found that Respondent's legitimate non-discriminatory business reason of poor work performance to be consistent with the evidence.
53. The Commission Panel found, based upon all the evidence, Ms. Catano did not satisfy her burden of production that Respondent's reason for her termination was pretext for discriminatory retaliation. Rather, the Commission found that the cumulative effect of Ms. Catano's repeated performance issues was the cause of her termination.
54. The Commission therefore finds the Respondent has not violated RSA 354-A:19, Retaliation.
55. This decision was not unanimous.

COMPLAINT DISMISSED. NEITHER PARTY IS ENTITLED TO ATTORNEY'S FEES.

SO ORDERED.

8/5/2021
Date

8/11/2021
Date

8/5/2021
Date

Nancy Q. LeRoy
Commissioner Nancy LeRoy, Chair

Basra Mohamed
Commissioner Basra Mohamed

Christian Kim
Commissioner Christian Kim

